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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-527

CHILDREN'S REHABILITATION CENTER, INC.,
a corporation,
Petitioner,

vs.

THE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL NO. 227 AFL-CIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Reasons for Denying Petitioner's request for a Writ of Certiorari:

POINT I

No important question of Federal Law is before this Court: The Court of Appeals correctly decided this case according to settled case law.

Despite Petitioner's contention that the Court of Appeals for the Third Circuit determined an important question of Federal Labor Law, namely, that the Court ultimately held that an employer may not pursue the traditional contract remedy of halting performance and suing for damages under Section 301 of the Labor Management Relations Act of 1947, 29 USC § 185, this was hardly the holding of the case at hand. Rather, the issue correctly decided by the Third Circuit and the District Court in this case was whether a plaintiff who had already clearly manifested an election of a remedy for breach of contract *other* than a suit in damages, *i.e.* rescission, may later bring a suit for damages even if the defendant has relied on the previous election. The District Court and the Third Circuit held, according to established case law, that the subsequent suit by a plaintiff in such an instance is barred. In other words, the holding as limited to the facts of this case called for an application of equitable estoppel as found in the so-called "election of remedies" doctrine. By no means did the Third Circuit unequivocally hold that under Federal Labor Law an employer is to be denied a traditional contract remedy when initiating suit under Section 301 of the Labor Management Relations Act of 1947, 29 USC § 185. Thus although Petitioner states that the important issue which has not been heretofore settled and should be settled

by this Court is that "By virtue of the decision of the Third Circuit, when a labor organization materially breaches a collective bargaining agreement, an employer is no longer entitled to elect the traditional contract remedy of terminating the contract for purposes of performance and suing for damages," (Petitioner's Brief at 7), the Third Circuit never held that at all. Indeed, writing for the Court, Judge Hastie obviously recognized the right of an aggrieved party to sue for damages; he merely qualified that right in the instance where a party seeks *two* remedies inconsistent with each other:

> "On the other hand, fairness to an employer confronted by an illegal strike may dictate judicial recognition of contract abrogation or damages as alternative available remedies. But it is neither necessary nor desirable to encourage the termination of labor contracts *by allowing both remedies.* From this viewpoint, the loss of the right *it otherwise would have to collect damages* for a breach is not an unfair price for an employer to pay if it insists upon total and permanent relief from the obligation it accepted under a labor contract." Decision of Third Circuit Petitioner's Brief p. 5a (Emphasis Supplied)

The remedy claimed to have been denied was, in fact, available to the Petitioner, but upon the clear election of an inconsistent remedy, rescission, the Petitioner could no longer sue for damages as *further* relief from the Respondent. This is precisely the holding of the case at hand and directly in accord with the highly instructive decision in *Boeing Airplane Co. v. Aeronautical Industrial District Lodge 751, International Association of Machinists*, 91 F. Supp. 596 (W.D. Wash.), aff'd 188 F. 2nd 356 (Ninth Cir.), cert. den., 342 U.S. 821, 96 L. Ed. 621, 72 S. Ct. 39 (1951).

In essence, the so-called important Federal Question allegedly presented by this case and asserted in Point I of Petitioner's Brief is not present.

POINT II

There is no need to review the conduct of the Court of Appeals because that Court did not depart from the accepted and usual course of Appellate Review.

Petitioner argues that the Court of Appeals for the Third Circuit "so far departed from the accepted and usual course of appellate review as to call for an exercise of this Court's power of supervision." (Petitioner's Brief at 13). It is hardly fair to characterize the Third Circuit's decision as indicating "a fair departure from the accepted and usual course of appellate review." That distinguished Court did no more than apply the applicable law and guiding precedent to affirm the District Court's Decision.

In *Boeing, supra*, it was held as a matter of law that notification by an aggrieved party to the party in breach that:

> "By reason of this strike, you are hereby notified that the agreement referred to above is terminated and at an end",

constituted an election to rescind the contract. *Boeing, supra*, 91 F. Supp. 596, 613. It was surely within the purview of the Third Circuit in the instant case to employ applicable law and affirm the District Court's finding that Petitioner's letter stating:

> "it considers the Agreement to be terminated in its entirety"

conveyed the unmistakeable purpose to insist on rescission. *cf. Wright v. Bristol P. Leather Co.*, 257 Pa. 552 (1917)—letters as to rescission for trial judge; *Maloney v. Madrid Motor Corp.*, 385 Pa. 224 (1956)—"no question that letter

constituted an effective notice of intent to terminate contract"; *Dick v. Ireland*, 130 Pa. 299 (1889)—"It is entirely clear that this letter was an absolute and complete rescission of the agreement".

Merely because the Court of Appeals did not apply Petitioner's version of the law hardly gives rise to a claim that the Court exceeded its scope of review.

Conclusion

No important question of Federal Law is presented by this case. A careful reading of the holding of the Third Circuit illustrates that that Court merely applied settled case law to correctly decide the case at hand. By no means did the Third Circuit exceed its scope of appellate review. There is not presented by this case any issue of such "gravity or importance" as to mandate the discretionary review of this Court by Writ of Certiorari. *Cf. In re* Lau ou Bew, 141 US 583, 35 L. ed. 868, 12 S. Ct. 43 (1891); Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251, 60 L. Ed. 629, 36 S. Ct. 269 (1915); U.S. Sup. Ct. Rule 19.

Petitioner's request for certiorari should be denied.

Respectfully submitted,

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